

STATE OF MICHIGAN
COURT OF APPEALS

GRAND CIRCUS DEVELOPMENT
CORPORATION,

Plaintiff-Appellant,

v

BELDON CONSTRUCTION COMPANY and
OLYMPIA DEVELOPMENT OF MICHIGAN,

Defendants-Appellees.

UNPUBLISHED
December 7, 2001

No. 219558
Oakland Circuit Court
LC No. 97-550320-CK

Before: Bandstra, C.J., and Whitbeck and Owens, JJ.

PER CURIAM.

Plaintiff Grand Circus Development Corporation appeals as of right from the trial court's order granting summary disposition to defendants Beldon Construction Company and Olympia Development of Michigan LLC under MCR 2.116(C)(8). We affirm.

I. Basic Facts And Procedural History

A. The Participants

Grand Circus is a corporation that owned a parcel of land at 150 Bagley in Detroit commonly known as the United Artists Theater Building (the property). RFP Associates, Inc. is a corporation and a licensed real estate broker. Beldon is a corporation described by Grand Circus as a "Don Barden Company." Olympia Development is a limited liability company whose principals, during the period at issue here, were Mike and Marian Ilitch. Mike Ilitch owns the Detroit Tigers. The Detroit Economic Growth Corporation (DEGC) is a non-profit corporation, consisting of public and private interests, organized to assist in the economic revitalization of Detroit.

B. The Property

Relying on a document dated October 30, 1995, between the City of Detroit Downtown Development Authority and the Detroit Tigers entitled "Memorandum of Understanding," Grand Circus asserts that the property was located within an area referred to as "the Stadium Project." The Stadium Project was in an area where properties were being assembled for the purpose of erecting a stadium for the Detroit Tigers. Grand Circus also asserts that the memorandum

revealed that the Detroit Tigers, Inc., “a Mike Ilitch Company,” would be entitled to receive all the concession revenues derived from events and activities conducted at the stadium complex.

C. The RFP Option

On April 5, 1995, Grand Circus entered into an option agreement with RFP Associates covering the property. The RFP option defined “optionor” to mean Grand Circus and “optionee” to mean RFP Associates and “its successors and assigns.” To be consistent, we refer to the option agreements in this case by the names of the optionee. For the April 5, 1995 option agreement, RFP Associates was the optionee for the RFP option. The RFP option noted that RFP Associates was acting “on behalf of unnamed parties.” The RFP option also included the following provision in ¶ 18:

Optionee [RFP Associates] warrants that Optionee is not: Mike Ilitch, Charles Forbes, Lee Iacocca or Andrew McLemore; nor is it for the benefit of the family of, or the business interests of these prospects. If it is determined that the Purchaser is for the benefit of these prospects, their families or their business interests, the option rights and claims of the Optionee shall be automatically extinguished, and be null and void. Any option monies, expenses or due diligence work shall be forfeited to Optioner [Grand Circus]. . . .

The RFP option provided in ¶ 8 that the warranties contained in “this Option Agreement shall be deemed to be continuing and shall survive for a period of twelve (12) months after the Closing and delivery of possession of the Property to Optionee.”

D. The Conveyances

(1) The April 1, 1996, Assignment Of The RFP Option

On April 1, 1996, RFP Associates assigned all its rights and interest in the RFP option to Beldon. Therefore, under the terms of the RFP option, Beldon, as RFP Associates’ assignee, became the optionee under the RFP option.

(2) The May 9, 1996, Assignment Of The RFP Option

Grand Circus alleges that on May 9, 1996, Beldon assigned its interest in the RFP option to the DEGC. Olympia disputes this allegation, asserting that the May 9, 1996, assignment document was never utilized, that Grand Circus did not allege this fact in its complaint, and that the trial court did not consider it when making its rulings. We have carefully reviewed the Grand Circus complaint and find no allegation that Beldon assigned its interest in the RFP option to the DEGC. In any event, as we outline below, this dispute is not determinative.

(3) The DEGC Option And The Conveyance Of The Property

On May 17, 1996, Beldon entered into an option agreement with the DEGC concerning the property. As the DEGC is the optionee under this option agreement, we will refer to it as the DEGC option.

On December 20, 1996, Beldon exercised the RFP option and on January 13, 1997, Grand Circus conveyed the property to Beldon by warranty deed.

On March 10, 1997, the DEGC notified Beldon that it was exercising the DEGC option in favor of Olympia. On March 14, 1997, the DEGC assigned its interest in the DEGC option to Olympia. Olympia, as the DEGC's assignee, therefore became the optionee under the DEGC option. On March 17, 1997, Beldon conveyed the property to Olympia by warranty deed.

E. The Lawsuit

Grand Circus filed suit in August 1997, seeking damages or, in the alternative, rescission of the transfers of title from itself to Beldon and from Beldon to Olympia on the ground that Beldon breached ¶ 18(m) of the RFP option when it sold the property to Olympia. The only document appended to the complaint was the RFP option. In April 1998, both defendants filed motions for summary disposition pursuant to MCR 2.116(C)(8). Olympia asserted that ¶ 18(m) of the RFP option was an unreasonable restraint on alienation of property and that it did not apply to its transaction with Beldon in any event because the option agreement was merged into the warranty deed Grand Circus gave to Beldon. Beldon also asserted that it was entitled to judgment.

Grand Circus responded that summary disposition was not appropriate under MCR 2.116(C)(8) because the complaint made sufficiently specific allegations to give defendants notice and to state a claim for relief. It asserted that ¶ 18(m) applied to the transaction because Olympia was a successor or sub-assignee of RFP and was aware of the terms of the RFP option, which prevented it from acquiring the property for one year from the time Beldon took title; and that ¶ 18(m) also applied to Beldon which, as RFP's assignee, accepted the option pursuant to its terms, Beldon was aware of those terms, and yet failed to advise Grand Circus of its deal with the DEGC, and that Olympia was interested in acquiring the property. Grand Circus also argued that the terms of the option agreement were not merged into the warranty deed and did not constitute an unreasonable restraint on alienation.

The trial court heard oral argument in November 1998 and took the motions under advisement. The trial court issued a written opinion and order on April 23, 1999. The trial court ruled that "[a]ny interpretation of the option which would allow plaintiff [Grand Circus] to enforce the restraint after conveying the property, either by money damages or by equity, would violate the rule against restraints on alienation" and granted defendants' motions on that ground.

II. Standard Of Review And Legal Standard

As this Court explained in *Smith v Stolberg*¹:

A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of a claim by the pleadings alone. This Court reviews de novo a trial court's decision regarding a motion for summary disposition under MCR

¹ *Smith v Stolberg*, 231 Mich App 256, 258; 586 NW2d 103 (1998).

2.116(C)(8) to determine whether the claim is so clearly unenforceable as a matter of law that no factual development could establish the claim and justify recovery.”

Further, in reviewing a trial court’s decision on a (C)(8) motion, this Court accepts as true all factual allegations in the claim and reasonable inferences that may be drawn from them.²

III. Restraints On Alienation

A. Grand Circus’s Argument; Legal Standards

Grand Circus frames its argument on appeal in terms of restraints on alienation. It asserts that the RFP option, which it claims “prohibited certain named individuals and related person or entities from constituting the optionee or purchaser,” was not an unreasonable restraint on alienation. We first note that restraints on alienation are highly disfavored, and such provisions are strictly construed against the party seeking to enforce them.³ However, “[w]hen an unreasonable restraint on alienation is found, the remedy is to declare the restraining provision unenforceable, not to declare the conveyance unenforceable.”⁴

B. The Provisions Of The RFP Option

(1) Identity

Rather clearly, the *only* instrument at issue here is the RFP option. Grand Circus was not a party to the DEGC option nor was it a third party beneficiary under that option. The terms of the DEGC option are, therefore, irrelevant to the issue of whether Grand Circus could withstand a motion for summary disposition under MCR 2.116(C)(8). Thus, we first turn to the plain language of the RFP option. In it, RFP Associates warranted that it was not Mike Ilitch, Charles Forbes, Lee Iacocca or Andrew McLemore, nor that it was “for the benefit of the family of, or the business interests of these prospects.” Self-evidently, RFP, a corporation, was not Mike Ilitch.⁵ Equally self-evidently, Beldon, RFP’s assignee and therefore the optionee after April 1, 1996, was not Mike Ilitch. Nor, if one accepts Grand Circus’s argument concerning the assignment of the RFP option from Beldon to the DEGC as being true, was the DEGC Mike Ilitch. Finally, Olympia, while owned by the Ilitches, was a separate legal entity and was, therefore, not the individual Mike Ilitch.

² *Id.*

³ *Ottawa Shores Home Owners Ass’n, Inc v Lechlak*, 344 Mich 366, 372; 73 NW2d 840 (1955); *Pellerito v Weber*, 22 Mich App 242, 245; 177 NW2d 236 (1970).

⁴ *LaFond v Rumler*, 226 Mich App 447, 457; 574 NW2d 40 (1997).

⁵ We will only refer hereafter to Mike Ilitch, as Charles Forbes, Lee Iacocca and Andrew McLemore are not involved in this matter.

(2) “For The Benefit Of”

(a) Overview

The question then becomes whether RFP, Beldon, the DEGC, or Olympia were “for the benefit of the family of, or the business interests of” Mike Ilitch. In ¶ 23 of its complaint, Grand Circus alleged that the sale of the property by Beldon to Olympia constituted a “breach of the representations and warranties of the Option. . . .” At best, the pleadings hint that Beldon acted with some sense that the property would ultimately end up in the hands of an Ilitch entity. Giving every benefit of the doubt to Grand Circus, it is possible to read this very broad language as asserting that Beldon violated the warranties in the RFP option because it was “for the benefit of the family of, or the business interests of” Mike Ilitch. Going one step further, we can even assume that on May 9, 1996, Beldon assigned its interest in the RFP option to the DEGC.

(b) RFP And The DEGC

Neither RFP nor the DEGC are parties to this suit. Therefore, we need not address them further.

(c) Olympia

There is no question that Olympia was “for the benefit of” Mike Ilitch; he and his wife owned Olympia. There are two possible theories of liability against Olympia. The first is that Olympia was the optionee under the RFP option. Again, assuming that RFP assigned its option to Beldon who, in turn, assigned it to the DEGC, the chain stops at this point. Grand Circus never alleged that Olympia itself ever became an optionee under the RFP option; in other words, Grand Circus never claimed that the DEGC somehow assigned its interest in the RFP option to Olympia. Rather, it is entirely clear that the DEGC assigned its interest in its own option, the *DEGC option*, not the *RFP option*, to Olympia and that it was under the *DEGC option* that Olympia acquired the property. Thus, Grand Circus could not prevail on, nor did it plead, a theory that it had a cause of action against Olympia as the optionee under the RFP option. As a result, to prevail against Olympia, Grand Circus must do so on a theory that Olympia was the buyer under the RFP option and was therefore bound by it as a buyer.

There are three problems with theory. The first is, again, that Olympia did not buy the property under the RFP option; Olympia bought the property under the DEGC option. The second problem is that the RFP option did not forbid the sale of the property to Mike Ilitch or his interests for twelve months after closing. Rather, it prescribed twelve months as the period of time during which Grand Circus could act if it discovered that the optionee, not the optionee’s eventual buyer, was in fact Mike Ilitch or his agent. The plain language of the RFP option does not forbid selling the property to any Ilitch entity, but rather forbids the optionee from *being* Mike Ilitch or his agent. Further, Grand Circus cites no authority for the proposition that a buyer of property (Olympia) from an entity (Beldon) who took the property from another entity (RFP) who, in turn, took the property from its original owner (Grand Circus) under an option agreement (the RFP option) becomes itself restricted *as a buyer* by that agreement.

The third problem is that, even if Grand Circus could jump the first two hurdles – which it cannot – it could not survive the third: any such restriction on it as a buyer under the RFP option would be an unreasonable restraint on alienation, as outlined below. Therefore, Grand Circus has no remedy whatever against Olympia, the eventual buyer. Grand Circus's sole remedy, under the plain language of the RFP Option, would be against RFP Associates or the DEGC, who are not defendants, or Beldon, which is.

(d) Beldon

Assuming, without deciding that the forfeiture provision of the RFP option was valid as applied to Beldon during the term of the option, Grand Circus contracted for the right to terminate the RFP option if it discovered that the optionee (Beldon) was, or acted on behalf of, Ilitch. However, Grand Circus never sought to declare the RFP option forfeit while it was in existence. Instead, Grand Circus sought to enforce the twelve-months-after-closing provision against Beldon's sale of the property to Olympia three months *after* Beldon acquired the property. Because Grand Circus retained no interest in the property after transferring title to Beldon, any such prohibition is an unreasonable restraint on alienation,⁶ which the trial court properly ruled was unenforceable.⁷ This holds true regardless of the reasonableness of the forfeiture provision in the option agreement as applied to the optionee during the term of the option in the first instance.

We further note that Grand Circus's complaint concedes that the property passed to Beldon by warranty deed. Under such circumstances, the conveyance was one in which the grantor (Grand Circus) "warrants good, clear title."⁸ A seller may enforce restrictions on alienation only if the seller retains a significant interest in the property, such as when the seller retains a right of reversion.⁹ If property is conveyed in fee simple, the grantor may not limit the grantee's right to sell the property.¹⁰ In such cases, a restriction on the number of potential buyers "is repugnant to the grant and a restraint on the inherent right of alienation and therefore void."¹¹ In this case, because Grand Circus asserted in its complaint that it conveyed the property to Beldon by warranty deed, thus guaranteeing clear title, the trial court correctly ruled that any continuing restraint on alienation stemming from the RFP option was unreasonable and thus void.

Grand Circus further argues that it had a claim against Beldon for violating the RFP option before the sale of the property. However, Grand Circus made no such allegation in its complaint, which was predicated solely on Beldon's sale of the property to Olympia. The record does not indicate that Beldon ever sought leave to amend its complaint to include such a claim.

⁶ *Braun v Klug*, 335 Mich 691, 695; 57 NW2d 299 (1953).

⁷ *LaFond*, *supra*.

⁸ Black's Law Dictionary (6th ed), p 1589.

⁹ *Braun*, *supra* at 695.

¹⁰ *Id.*

¹¹ *Id.*

Thus, Grand Circus's ability to state a different cause of action does not bear on the propriety of the trial court's ruling on the claims that were in fact pleaded.

For these reasons, we conclude that the trial court properly granted defendants' motions for summary disposition.

Affirmed.

/s/ Richard A. Bandstra
/s/ William C. Whitbeck
/s/ Donald S. Owens